In The

Supreme Court of the United States

October Term, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LeROY OLSON and CAROLE DAVEY,

Respondents.

REPLY BRIEF FOR PETITIONERS

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ARGUMENT.

In our Petition for Certiorari we have cited the numerous cases in which school districts, school boards and other educational agencies, have been held to be outside the purview of 42 U.S.C. §1983. Respondents in their brief in opposition have been unable to cite any case where that specific issue was before the court and where a holding to the contrary has been specifically rendered. Furthermore, now is the proper time to present this issue for appeal on certiorari. The list of state agencies and public entities absolved from the necessity of defending civil rights actions of this kind is growing at an accelerated rate in light of this court's recent decisions in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973). In addition, this Supreme Court has very recently granted certiorari in the case of *Wood* v. *Strickland*, Docket No. 73-1285, in which the question of immunity from suit under §1983 for school boards and their individual members has been directly presented for review—the exact issue presented here.

School districts and school boards have increasingly become the targets of civil rights actions of this kind. The holding of the Court of Appeals, if allowed to stand in this case, will only serve to encourage a greater multiplicity of such suits in the future. The supervision and clarification of the issue by this court is now necessary because state educational agencies will be held amenable to suit under 28 U.S.C. §1343 and 42 U.S.C. §1983 while other state agencies remain immune from such litigation

even though they differ only in terms of the specific governmental functions they perform.

In short, the questions presented in our petition are presently ripe for review. The petitioners should not be required to enter into an unnecessary adjudication of this case in the trial court only to discover later that they were correct in their assertion that they were not proper defendants in the first instance. The extent of the coverage of §1983 affects the subject matter jurisdiction of the District Court under 28 U.S.C. §1343. If that court does not have the power to proceed as to all or certain of the defendants, the litigation against all who are not proper parties should be immediately terminated.

Again we must stress that we are not simply contesting the denial of a motion to dismiss or any other mere interlocutory order as the respondents suggest. The Court of Appeals has directly ruled on a subject matter jurisdictional question. The power of the trial court to proceed with this matter is an issue which may be raised at any time and before any court which is called upon to consider the case.

I.

ILLINOIS SCHOOL BOARDS ARE DESIGNATED BY ILLINOIS LAW AS CORPORATE STATE AGENCIES.

The respondents argue that we do not consider the question of immunity for a board of education as distinct from a school district. While there may be a literal distinction between the district as a geographical unit and a board of education as the governmental agency operating it, the law of Illinois is that a school board is a corporate *state agency*.

The respondents have named as defendants not only the members of the board in their respresentative and individual capacities, but also the Board of Education as an entity. The law of Illinois is clear that a board of education is treated like a municipal corporation and as such it is not a "person" for purposes of an action under §1983. Chapter 122, Section 10-2, Ill. Rev. Stat., clearly states:

> The directors of each district shall be a body politic and corporate, by the name of "School Directors of District No. ....., County of ....., and State of Illinois, . . .". (See Appendix A herein)

The Illinois courts have always considered school boards to be *agencies* of the state. In *Wauconda Tp. School Dist.* v. *County Board Etc.*, 7 Ill. App. 2d 65 (1955), the Court states at page 68:

> School districts are involuntary political or civil divisions of the state created as auxiliaries of the state to aid in the general administration of government. A legally constituted school district is composed of the territory included within its corporate boundaries. It is a quasi-municipal corporation and the board of education of the school district is an agency of the state and not a subdivision thereof and is a separate and distinct corporation which furnishes the method and machinery for government and management of the district.

In fact, under Ilinois law board members may not be sued individually in their representative capacities for only the board as a corporate entity may be properly named in such a suit, *Botkin et al.* v. *Osborne*, 39 Ill. 101 (1866).

A further implication of Illinois law is that board members acting in their official capacities are to be specifically given protection from suit in actions of this kind. Chapter 122, §10-20.20, Ill. Rev. Stat., the Illinois School Code specifically empowers school boards:

> To indemnify and protect school districts, members of school boards, employees, and student teachers against civil rights damage claims and suits, constitutional rights damage claims and suits . . . when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board. . . . (See Appendix A herein)

Thus, to extend coverage of §1983 to school boards and their members in this instance would be to subject the taxpayers of the school district to possible exposure to damages in this case. Such a circumstance if allowed to exist directly contravenes the reasons for the recognized legislative exception attached to the meaning of the word "person" in §1983.

Respondents attempt to distinguish the many cases which we have cited to the Court. But the plain fact is that state governmental agencies such as school boards in Illinois are not within the coverage of §1983. Board members have no individual governmental authority in Illinois. In their representative capacities they take on the collective quasi-municipal corporate identity cast upon them by Illinois statute. That is the thrust of the many cases cited to this Court and no matter whether a school district, school board or other educational agency is involved, state-created and controlled agencies are specifically exempted under §1983.

II.

IF THE SCHOOL BOARD AND ITS MEMBERS ARE NOT PROPER "PERSONS" UNDER §1983, THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION.

The respondents erroneously contend that if the coverage of §1983 is not extended to the defendants in this case, then they may still maintain their action under 28 U.S.C. §1331 or 1343(3). But this is simply not the case.

§1331 is not alleged as a ground for jurisdiction in the complaint and is not in issue before this or any other court.

The assertion that the constitutional amendments alone are grounds for jurisdiction is clearly not the law. Plaintiffs in the case of *Harkless* v. *Sweeny Independent Sch. Dist. of Sweeny, Texas,* 300 F. Supp. 794 (1969) unsuccessfully made a similar argument. The court held at p. 807:

> Section 1343 grants to the district courts jurisdiction only over civil actions "authorized by law to be commenced by any person." It cannot be argued that the Fourteenth Amendment itself authorizes the commencement of civil actions. To so construe it would be to ignore the express terms of the Amendment and render the enactment of 42 U.S.C. §1983 superfluous. . . . Therefore, as 28 U.S.C. §1343(3) is not sufficient in the absence of another statute to authorize the prosecution of civil actions against persons alleged to have violated another's constitutional rights, plaintiff's claim must be dismissed.

The respondents cite *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971) and *Bell* v. *Hood,* 327 U.S. 678 (1946), for their proposition that the "constitution may give rise directly to causes of action. . . ." (Opp. p.

11, note 4). But those opinions clearly do not state what respondents assert about them. In *Bell* v. *Hood*, this court reserved the question of whether the Fourth Amendment gives rise to a cause of action for damages. In *Bivens* it is clear that the only issue before the court was whether the Fourth Amendment gives rise to a cause of action for damages for purposes of the jurisdictional amount under §1331. §1343(3) jurisdiction was not involved in either of these cases.

The respondents have invoked the subject matter jurisdiction of the District Court by way of §1343(3). Since §1983 does not authorize a cause of action against the defendants here, and since no other federally allowed statutory cause of action is alleged, there is no ground for §1343 jurisdiction. It is a well-known proposition of law that lack of jurisdiction over the subject matter is never waived, and if such lack of jurisdiction appears at any time in the case, the court must dismiss the action. Rule 12(h)(3) F. R. Civ. Proc.; *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381 (8 Cir. 1960).

What causes of action respondents could have alleged or may in the future allege is of no consequence in this case. The subject matter of the District Court over the cause of action alleged in this case is in issue and that is an issue which is ripe for review at any stage of the proceedings.

III.

NO COURT HAS SPECIFICALLY HELD THAT SCHOOL BOARDS ARE "PERSONS" UNDER §1983 WHERE THE QUESTION HAS BEEN SPECIFICALLY RAISED.

The respondents next contend that the holding of the court below is not in conflict with the *Moor*, *Monroe* and

City of Kenosha decisions rendered by this court. They state that these decisions did not involve boards of education, and thereafter set out numerous decisions in which relief was granted under §1983 against school boards and school districts without any mention of immunity. However, in none of the cases cited by the respondents was the question of immunity ever raised by the parties or by the courts.

In *Monroe* v. *Pape,* 365 U.S. 167, 191 n. 50, this court specifically declined to consider the extent of the coverage of §1983 based upon cases which did not specifically raise the question of immunity under the statute. The same point was recently made in *City of Kenosha* v. *Bruno,* 37 L. Ed. 2d 109 at 116.

Since none of the cases cited by the respondents spefically raised the issue of immunity under §1983 they are of no consequence in determining the coverage of that statute if the past custom of this court is to be continued.

The very recent opinions in *Scheuer* v. *Rhodes,* 42 U.S.L.W. 4543 (April 17, 1974) and *Edelman* v. *Jordan,* 42 U.S.L.W. 4419 (March 25, 1974) are cited as authority to the effect that a board of individuals is subject to suit under §1983. The plain fact is that the court as in both instances speaking solely of immunity under the Eleventh Amendment—a question which is not entirely determinative of this case.

IV.

THE PARTIES WERE NOT PROPERLY ALLOWED TO BRIEF AND ARGUE THE COVERAGE OF §1983 ON THE MERITS.

The Respondents state that the question presented here was argued before the Court of Appeals. While the issue

was mentioned in the briefs on both sides, neither plaintiffs nor defendants fully argued or briefed the merits of the immunity question because the Court of Appeals was not called upon to rule on anything other than the substantive constitutional issues originally presented by the respondents.

Respondents ignore their own written comments about the question of immunity which were presented to the Court of Appeals through a letter to Clerk Kenneth J. Carrick dated October 4, 1973 (Opp. App. 4a):

> *City of Kenosha* raises a question whether the Aurora school board is suable under Section 1983. While we take the position that it is, this question need not be resolved here. . . . The court can, therefore, proceed to decide the constitutional issues presented in the case and leave the question of the suability of the school board for resolution on remand with full briefing and development of the facts.

Even the Court of Appeals states at (Pet. App. 8a):

> There are other points such as whether plaintiffs could recover the types of damages they claim, which do not go to the *only issue before this court; that is whether the complaint states a valid cause of action.* (Emphasis supplied)

It is clear that the parties, themselves, intended only to contest the single ground for dismissal relied upon by the trial court and that the Court of Appeals erroneously and gratuitously took it upon itself to decide some of the other grounds for dismissal without first properly calling upon the arguments of counsel or considering the current state of the law as set forth by this court.

CONCLUSION.

For the reasons and authorities presented above and in our original Petition, Petitioners pray that this court issue a Writ of Certiorari or that this Petition be consolidated by this court along with *Wood* v. *Strickland,* No. 73-1285 upon which certiorari has already been granted on substantially the same issues.

Respectfully submitted,

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APPENDIX A

ILLINOIS REVISED STATUTES, CHAPTER 122

10-2. § 10-2. Corporate powers. The directors of each district shall be a body politic and corporate, by the name of "school directors of district No. ....., county of .....and State of Illinois," and by that name may sue and be sued in all courts and places where judicial proceedings are had.

10-20.20. § 10-20.20. Protection from suit. To indemnify and protect school districts, members of school boards, employees, and student teachers against civil rights damage claims and suits, constitutional rights, damage claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board. Such indemnification and protection shall extend to persons who were members of school boards, employees of school boards or student teachers at the time of the incident from which a claim arises if that incident occurred on or after September 5, 1967. No agent may be afforded indemnification or protection unless he was a member of a school board, an employee of a board or a student teacher at the time of the incident from which the claim arises. Amended by P.A. 77-719, § 1, eff. Aug. 12, 1971.